

OSEI-OWUSU (Migration) [2021] AATA 2303 (16 June 2021)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs FRANCISCA OSEI-OWUSU

CASE NUMBER: 1732556

DIBP REFERENCE(S): BCC2015/1450324

MEMBER: Russell Matheson

DATE: 16 June 2021

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Spouse) visa:

- Public Interest Criterion 4020 for the purposes of cl.801.226 of Schedule 2 to the Regulations.

Statement made on 16 June 2021 at 12:24pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse) – bogus document or false and misleading information in visa application – adverse information – previous marriage in home country not declared – divorce certificate provided found to be counterfeit – certificate obtained by ex-husband – applications completed by sponsor, declaring applicant never married – married in Australia while still legally married by law of home country, with applicant declaring herself never married – compassionate or compelling circumstances to waive requirements – de facto partnership existed even without valid marriage – relationship ceased – late claim of family violence with no evidence provided – study and work in Australia – projected shortage of workers in applicant’s work sector – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5(1), 65, 359AA

Migration Regulations 1994 (Cth), Schedule 2, cl 801.226, Schedule 4, criterion 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 11 December 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant is a 43-year-old female national of Ghana. She applied for the visa on 18 May 2015. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.801.226 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found that the applicant had provided information that was false or misleading in a material particular in respect of the visa application and did not meet Public Interest Criterion (PIC) 4020. The applicant seeks review of the delegate's decision.
6. The applicant appeared before the Tribunal via telephone on 28 May 2020 to give evidence and present arguments. The Tribunal also received oral evidence from a witness Mr P the applicant's local pastor. The Tribunal hearing was conducted with the assistance of an interpreter in the Akan (Ghana) and English languages.
7. The applicant was represented in relation to the review by her registered migration agent.
8. The Tribunal exercised its discretion to hold the hearing by telephone. The hearing was held during the COVID-19 pandemic. The Tribunal determined it was reasonable to hold a hearing by telephone, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by telephone. The applicant raised no concerns regarding the conducting of a telephone hearing. The Tribunal is satisfied that the applicant was given a fair opportunity to give evidence and present arguments.
9. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration.**
10. **Hearing**
11. At the beginning of the hearing the Tribunal in accordance with s.359AA of the Act, put to the applicant information that it would consider to be the reason or part of the reason for affirming the decision under review. The Tribunal explained the relevance and the consequences of the information and invited the applicant to comment on or respond to the information. The Tribunal also told the applicant that she could respond to that information verbally or in writing or she could seek additional time to comment on or respond to it. The applicant decided to respond verbally at the hearing.
12. The Tribunal put to the applicant the gist of the information contained in folio 80 of the Department's file: being that her sponsor had withdrawn his sponsorship on 24 October 2016 and that the applicant did not declare to the sponsor or to the Department that she had been married to the father of her children. The applicant responded:
 13. That she had told the sponsor that she was married to the father of her children and that he knew she was married. She further stated that she did not understand why the sponsor made such claims as she had told him when he met her kids during courtship.

14. The Tribunal finds the information provided by the applicant and sponsor problematic as the relationship has ceased and is unable to question the sponsor and the information is contradictory. The Tribunal is of the view that it would be unlikely the sponsor would make a false claim as he was aware of the applicant's relationship with her ex-husband and knew him by name and listed him as the applicants de facto in the sponsorship for a partner to migrate to Australia form (Form 40SP) at question 33. He also answered "No" at question 32 as to whether the applicant had been married to another person (including if they are still legally married to that person). Furthermore, the applicant signed and declared her conjugal status to be "Never Validly Married" on her marriage certificate. The Tribunal places some weight on the sponsors claim that the applicant did not inform him she was married to the father of her children.

15. Consideration of claims and evidence

16. The issue in this review is whether the applicant meets PIC 4020 as required by cl.801.226 for the grant of the visa. Broadly speaking, this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
17. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

18. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

19. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
20. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
21. There is evidence before the Minister that the applicant has provided, or caused to be provided, a bogus document or false or misleading information in this visa application.
22. The Department received allegations that the applicant was married to an individual other than her sponsor in Ghana which she had failed to declare to the Department, and that she remained legally married to this third party.
23. The Department further received a Ghana-issued Marriage Certificate that purportedly lists the applicant as one of the parties who were married on 16 February 2004. This Marriage Certificate has been verified as a genuine document by the relevant overseas authorities.
24. On 5 July 2017 the Department wrote to the applicant and invited her to comment on the above adverse information.
25. The applicant responded, via her representative, on 7 August 2017 and confirmed that she was previously married in Ghana, however she claimed that this marriage was dissolved on 4 January 2010. In support of her claims, she provided a document that she claimed to be a Divorce Certificate issued by the Circuit Court of Ghana Tema A.D 2010 (Suit NO.C.5/103/2010).
26. This Divorce Certificate was referred to the relevant overseas authorities who subsequently confirmed that this document did not originate from the court as she claimed, and that this document was verified to be a counterfeit document.
27. Furthermore, on 18 May 2015, as part of her application, the applicant submitted a Marriage Certificate issued by the NSW Births Deaths and Marriages Registry (dated 4 May 2015), in which it stated that she had declared her conjugal status to be "Never Validly Married". Given that she has stated that she was were married in Ghana that resulted in a divorce, the conjugal status she declared to the NSW Births Deaths and Marriages Registry would have been incorrect. It appears that the NSW Marriage Certificate was obtained via false or misleading information.
28. Based on the above information, the applicant has provided, or caused to be provided, a bogus document or false or misleading information in relation to this visa application.
29. The Tribunal questioned the applicant as to why she had provided false or misleading information, or bogus documents to the Department in relation to her visa application.
30. The applicant responded that her previous husband had organised with someone in Ghana to obtain her divorce certificate and she relied on the sponsor to organise her visa application and he sent her the paperwork to sign and she sent it back to him without reading it. She further stated that she trusted the sponsor to fill in the application form and that he also organised the marriage certificate in Australia and she did not know that he had

completed it incorrectly by not declaring her previous marriage. The applicant denied any responsibility for providing, a bogus document or false or misleading information in relation to the visa application to the Department because she was not involved. The applicant requested further time to provide additional information to the Tribunal and was granted until 11 June 2020 to provide further information.

31. On 10 June 2020 the applicant provided a written response (statutory declaration) through her representative and provided the following documents:
- A Certificate III in Aged Care in the applicant's name from ANTS;
 - A character reference supporting the applicant from Mrs E;
 - A certificate of Diploma of Community Services in the applicant's name;
 - A letter of support from iCare Community Services;
 - A copy of the applicant's Royal Rehab staff ID card;
 - A State of Attainment-Aging Support from Dementia Australia in the applicant's name; and
 - A statutory declaration from the applicant.
32. The applicant raised the following points and explanations regarding whether the applicant had given, or caused to be given a bogus document or false or misleading information in relation to the visa application to the Department that includes but is not limited to the following:
- That she was not married to another individual in Ghana and that she was legally single when she married the sponsor.
 - She was previously married to Mr F in accordance with Akan customary marriage traditions followed by a civil marriage on 16 February 2004.
 - She divorced Mr F on 4 January 2010 due to irreconcilable differences, and her customary marriage was dissolved according to Akan tradition by their respective elders on 6 March 2010.
 - That when she met her sponsor in Ghana in August 2011 there was no impediment to her marriage because she was single.
 - That she married the sponsor in May 2015 to the exclusion of all others and believed that the relationship was long-term.
 - In reference to her partner visa application, the applicant indicated that she had a previous relationship that ended on 6 March 2010 and the date refers to the dissolution of her customary marriage.
 - The sponsor prepared the application form and posted it to her in Ghana to sign and lodge it, and at the time she did not have much knowledge about how to apply for an Australian visa and trusted the sponsor with her affairs and assumed that he had declared as discussed with him her previous marriage.

- That she had told her sponsor that she was divorced and had three children and expected him to put that information on the application. Furthermore, the application form shows that the sponsor informed the Department of her previous relationship.
- The applicant's civil marriage was dissolved on 4 January 2010 as shown on her divorce certificate.
- The applicant claims that she did not remain married to a third party whilst married to the sponsor, and to the best of her knowledge she had informed him about her previous marriage and expected him to provide that information to the Department.
- That her divorce certificate and statutory declarations from interested parties provided to the Department show that there was no legal impediment to her marrying the sponsor.
- The allegation that she failed to declare that she was married at the time of her application is incorrect and the adverse information in her application was unintentional sloppy conduct by her sponsor when filling in the application form, which she signed without knowing the consequences and it is plausible it was just a mistake.
- That any adverse information in the application was not done intentionally to hide her previous relationship and she accepts full responsibility for the mistake and believes this would not have happened if she had fully understood the content in the application.
- That with the benefit of hindsight and checking copies of her visa application after being informed of the adverse information she acknowledges that unintended errors were made in the application form by the sponsor before she arrived in Australia.
- In response to the adverse information that the Divorce Certificate issued by the Circuit Court of Ghana Tema A.D 2010 (Suit NO.C.5/103/2010) is a bogus document, she believed it to be genuine without any shadow of doubt. She further stated that the divorce application was initiated by her former husband with her consent and was not aware the divorce certificate that he had sent her was counterfeit as noticed by the Department.
- The applicant claims she contacted her former husband to vent her anger over the counterfeit document and he denied the suggestion. She further stated that her ex-husband told her he had enlisted the assistance of a lawyer hanging about outside the courthouse in Ghana who he had paid to assist him in filing the divorce papers and to obtain the divorce certificate which he received in March 2010 and had no reason to doubt its authenticity.
- The applicant claims that her former husband was swindled by the lawyer and she would not have knowingly submitted the counterfeit document with the application to the Department and that she had no expertise or suspicion to notice that the document was counterfeit and that she did not knowingly provide a bogus divorce certificate to the Department with her visa application and provided it in good faith.

- The applicant claims she is now aware that the lawyer who assisted her ex-husband did not have the authority to present himself as a lawyer and in fact did not use the right legal channels to obtain a genuine document expected of a lawyer. The applicant further states that she provided media excerpts of country information on Ghana to the Department showing how local people are exploited by people posing as lawyers and she is a victim of corrupt practices.
- The applicant claims in relation to the NSW Marriage Certificate and the conjugal status to have been "*Never Validly Married*" as shown on the application that it was a mistake made by the sponsor which she was not aware of as she had told him that she had been married when they first met and it makes no sense why he would make such a declaration on the marriage certificate. She further stated if she had filled in the Registry's application forms herself, she would not have declared herself to be "*Never Validly Married*" because she knew that she had previously been married. The applicant also said that she was new to Australia at the time and did not know how things worked and followed the sponsor's instructions and he took her to the Registry at Parramatta, and she followed as an obedient fiancée. She also said that the sponsor was proficient in dealing with immigration issues and government affairs having lived in Australia for over 20 years and had travelled overseas extensively and she placed all her trust in him and did not question him and she just complied and signed the documents the sponsor provided in relation to her visa application and civil marriage in Australia without knowing the full consequences of the content declared because she was new to the country and naïve.
- The applicant claims that the sponsor is culpable as he provided the inconsistent and misleading information to the Department regarding her visa application and Australian marriage certificate and this would not have occurred if she had filled out the declarations herself.
- The applicant declares that she did not knowingly set out to provide bogus documents, or false or misleading information in relation to the application, and she was genuinely caused to give information she believed to be true at the time.

33. The applicant has consistently denied any responsibility for providing, a bogus document or false or misleading information in relation to the visa application to the Department and has placed all blame on her ex-husband and the sponsor. The applicant has provided similar information and documentary evidence to the Tribunal and Department for consideration. In relation to the counterfeit Divorce Certificate she submitted to the Department, she denied responsibility and claimed that her ex-husband had initiated the divorce proceedings with the assistance of a lawyer/solicitor, and that she did not question the authenticity of the document when she had obtained it from her ex-husband. Furthermore, she states that she believed that her ex-husband was deceived by fraudsters posing as legal practitioners. The applicant also provided news articles and country information supporting her claims. The applicant also gave evidence that she has no expertise and had no reason to suspect that the divorce certificate was a counterfeit document and provided it in good faith.

34. The Tribunal accepts that the applicant has no expertise to identify document fraud and the prevalence of fraudsters and the availability of counterfeit documents is high in Ghana. The Tribunal accepts that it is possible the applicant was not aware that the divorce certificate was counterfeit. However, the Tribunal places little weight on the news articles that have been submitted as the circumstances described within the articles do not directly apply to or refer to her situation. The Tribunal notes that there is no information before it that demonstrates that the applicant has made any attempt to rectify her marital status with the relevant Ghana authorities and she remains legally married to her ex-husband (under the

Marriage Ordinance Cap 127). Based on the information provided the Tribunal is not satisfied that the applicant has sufficiently addressed the adverse information in relation to the bogus divorce certificate. The applicant provided a statutory declaration (TF/103) from her uncle and grandmother that her customary marriage with her ex-husband was dissolved by elders on 6 March 2010. The Tribunal accepts that her customary marriage has been dissolved and is not satisfied that her civil marriage has not been annulled.

35. The applicant has failed to declare her previous marriage to the Department, as well as the declaration of "*Never Validly Married*" conjugal status listed on the Marriage Certificate issued by the NSW Births Deaths and Marriages Registry (dated 4 May 2015). She denied responsibility and attributed this to the sponsor's failure to correctly complete the relevant forms.
36. The Tribunal acknowledges that while it is plausible that one could complete one form incorrectly, given that the applicant claims that the sponsor was aware of her previous marriage and that he was proficient in dealing with migration issues and government affairs, the Tribunal does not find it plausible that one could incorrectly complete at least two different forms stating the applicant had never been married unless he was convinced of the fact to two different government agencies.
37. Upon considering the totality of evidence before it the Tribunal is of the view that the most plausible explanation of the adverse information is that the applicant intentionally withheld the fact that she was not validly divorced, as that would have made her ineligible for the consideration of the Prospective Marriage (Subclass 300) visa and the subsequent Partner (Subclass 820) visa.
38. Although the applicant has denied responsibility for producing the bogus documents in question, it does not mitigate the fact that the Divorce Certificate she submitted to the Department is a counterfeit document, and that the Marriage Certificate issued by the NSW Births Deaths and Marriages Registry was obtained via false and misleading means. Additionally, the applicant and sponsor have declared on the application and sponsorship forms that the applicant has never been previously married. The Tribunal is of the view the onus is on the applicant to ensure that all documents provided are genuine and all the information provided to the Department is truthful and correct when applying for a partner visa.
39. Based on the information provided the Tribunal is satisfied the document that the applicant claims to be a Divorce Certificate issued by the Circuit Court of Ghana Tema A.D 2010 (Suit NO.C.5/103/2010) is a counterfeit document, and that the Marriage Certificate issued by the NSW Births Deaths and Marriages Registry was obtained via false and misleading means and the applicant has provided misleading information in the application (Form 47P) and sponsorship form (Form 40SP) that she had never been previously married.
40. Therefore, the applicant **does not meet** PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

41. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
42. There is no evidence that a visa was previously refused based on a failure to satisfy PIC 4020(1). Therefore, PIC 4020(2) does not apply

Should the requirements of PIC 4020(1) or (2) be waived?

43. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
44. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity, or concern for others.
45. The Tribunal is required to consider all the circumstances of the case, including any matters put forward by an applicant, and determine on the evidence as a whole whether there are compelling and/or compassionate circumstances justifying the granting of the visa.
46. The Tribunal considered whether there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. For the following reasons the requirements of PIC 4020(1) and (2) should be waived.
47. Information submitted indicates that the applicant is seeking a waiver on the basis that there are compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that justify the granting of the visa.
48. The Tribunal reviewed the claims and supporting information provided by the applicant. The applicant claims that the fact that she does not have a criminal record and she does not associate with criminals are compelling circumstances to waive the PIC 4020 requirement. The Tribunal is of the view having no criminal record is a prerequisite to being granted a partner visa and there is an obligation by the applicant to obey and uphold the laws of the land. The Tribunal is not satisfied that not having a criminal record and not associating with criminals are compelling circumstances to waive the PIC 4020 requirements.
49. The applicant has also stated that she is a law-abiding taxpayer working in aged care. The Tribunal does not consider the paying of taxes to be compelling circumstances affecting the interests of Australia, as paying taxes is an obligation for those who are in the workforce in Australia.
50. The applicant in her statutory declaration states that she first met the sponsor in August 2011 in Ghana, and they were married in Australia on 4 May 2015 and the relationship ceased due to family violence in October 2016. The applicant provided evidence to the Tribunal that she was in a genuine and continuing relationship with the sponsor during the relationship. The Tribunal has considered whether the genuineness of the relationship is a compassionate or compelling circumstance to waive the PIC 4020 requirements. The parties provided a copy of their marriage certificate to the Department and Tribunal; it appears that the marriage is not legally registered as the applicant has provided a counterfeit divorce certificate with the application. Nonetheless, for completeness the Tribunal has also considered if the parties were living together in a de

facto relationship. The Tribunal notes that the applicant was granted a Partner (Temporary) (Subclass 820) visa on 20 May 2015.

51. While a genuine spousal relationship is considered the basic requirement for a partner visa application, the Tribunal accepts that a genuine relationship could be a compassionate/and or a compelling reason to waive the PIC 4020 requirements. The Tribunal, when considering whether there may be compelling circumstances for waiving the requirements in PIC 4020 has considered r.1.15A(3) and r.1.09A. The Tribunal accepts that the applicant has provided a reasonable amount of evidence to the Department that includes, but is not limited to, the following, indicating that the applicant and sponsor were in a genuine spousal/de facto relationship at the time of application. The applicant provided documentary evidence of the financial aspects such as: joint bank statements, the sharing of day-to-day household expenses and payment of utility bills in joint names. She also provided photographic evidence of the parties' wedding, social activities, and travel together in Ghana and Australia and statutory declarations from family and friends attesting to the parties' relationship and that they represented themselves as being in a spousal/de-facto relationship. Additionally, the applicant has provided documentary evidence, correspondence and receipts addressed jointly and individually to the parties indicating that they had established a joint household and were living together before the relationship ceased. They also provided evidence of sharing the household duties and responsibilities. The parties provided evidence of their commitment to the relationship and a reasonable degree of companionship and emotional support and a belief that their relationship was long-term. The Tribunal accepts that they were in a relationship for approximately 18 months before it ceased. Based on the above, the Tribunal accepts the evidence provided indicates the parties met the requirements of s.5F (2)(a)-(d) or 5CB (2)(a)-(d) of the Act, but they were able to do so by providing false and misleading information to the Department at the time of application. However, the Tribunal in this case is not satisfied when considering all the circumstances of this couple, that the genuineness, mutual commitment, emotional support, continuing nature and longevity of the parties' relationship are, when considered singularly or cumulatively, circumstances that should compel the Tribunal to waive the PIC 4020 requirements.
52. The Tribunal does not consider that being in a genuine and continuing relationship before the relationship ceased are compelling circumstances that affect the interests of Australia, or are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), to justify waiving the requirements of PIC 4020(1) and (2).
53. The applicant in a written submission provided by her authorised representative (undated TF folios 47-51) submits her relationship ceased with the sponsor in October 2016 because of family violence. The Tribunal acknowledges that the applicant's relationship with the sponsor has ceased. The applicant did not make a claim of family violence at the Tribunal hearing and there is no evidence before the Tribunal that the applicant is making a judicial or non-judicial claim of family violence being perpetrated against her by the sponsor. The applicant has not provided any evidence to meet the evidentiary requirements in Schedule 1 of IMMI 112/116 to make a judicial or non-judicial claim that she has suffered, and the alleged perpetrator (sponsor) is taken to have committed, domestic violence under r.1.23 of the Regulations. The Tribunal did not assess the applicant's relationship at the time of decision due to the limited information before the Tribunal regarding the circumstances of her relationship and whether she would be, or continues to be, the de facto partner of the sponsoring partner, except that the relationship between them has ceased, and the applicant has suffered family violence committed by the sponsoring partner as posed by cl.820.221(6). The Tribunal does not consider in this case based on the evidence provided (or lack of) that the applicant having been a victim of family violence are compelling circumstances that affect the interests of Australia, or are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible

New Zealand citizen (as defined in .1.03), that justify waiving the requirements of PIC 4020(1) and (2).

54. The applicant requested that consideration be given to the fact that since she has arrived in Australia she has completed courses and obtained qualifications to work as an aged care nurse, and that she is a compassionate person who loves working to improve the health and care of the aged and frail and has made vital social and health care contributions to the welfare of Australian citizens and she will continue to contribute to the Australian community in the future. The applicant further stated that she will continue her training in aged care and intends to enrol and study to become a registered nurse. The Tribunal accepts that the applicant has obtained qualifications and continues to work in the aged care industry and wants to become a registered nurse. The Tribunal notes that the Priority Migration Skills Occupation List 2020-2021 lists a Registered Nurse Aged Care (ANZSCO Code 254412) as a priority. The applicant does not meet that qualification under the list. The Tribunal accepts that during the COVID-19 period there may be a shortage of aged care workers in Australia. A cursory check online regarding the shortage of and demand for aged care workers in Australia revealed the following articles.

55. *Is there a shortage of and demand for aged care workers in Australia?*

56. The **aged care** sector will need 1 million extra **workers** by 2050, which is a quadrupling of the current workforce. Low pay has been one of the major challenges to attracting people to work in **aged care**. **Aged care** educator Tracey Newcombe said people need to stop thinking about ageing as a period of decline and disability (Aged Care Industry 26 March 2021).

57. The **Australian** population is ageing, and it is estimated that the number of **care** workers will need to triple by 2050 to meet this increase in **demand** in the future. According to the **Australian** Bureau of Statistics, the proportion of people **aged** 65 years and older has increased from 12.3% to 15.9% over the past 20 years (Melbourne City Institute of Education 25 September 2020).

58. Ongoing workforce **shortages** are inhibiting **Australia's** ability to meet increasing demands for high quality childcare and **aged care**. Nurses are demand, with Health Workforce **Australia** (HWA) estimating that there will be a **shortage** of over 100,000 nurses by 2025 (The Crisis in The Caring Industry-Parliament of Australia Library).

Australia is facing a chronic shortage of staff in aged care homes which have been at the epicentre of coronavirus outbreaks around the world. Research published in the *Medical Journal of Australia* shows that nearly 60 per cent of residents are living in aged care homes with "unacceptable" staffing levels. (Sydney Morning Herald 3 June 2020).

59. For the following reasons, the Tribunal **is** satisfied that the requirements should be waived.
60. Although the applicant consistently denied any responsibility for providing a bogus document or false and misleading information to the Department the Tribunal has found the document that the applicant claims to be a Divorce Certificate issued by the Circuit Court of Ghana is a counterfeit document, and that the Marriage Certificate issued by the NSW Births Deaths and Marriages Registry was obtained via false and misleading means and the applicant has provided misleading information in the application (Form 47P) and sponsorship form (Form 40SP) that she had never been previously married. However, on balance, there is evidence before the Tribunal to demonstrate that if the applicant was not granted the visa, Australia's trade or business opportunities would be adversely affected that Australia's relationship with a foreign government would be damaged, and that Australia would miss out on the significant benefit of the applicant's contribution to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought-after in Australia such as an aged care worker).

61. As a result, the Tribunal is satisfied that there are grounds to justify the waiver of PIC 4020 and the granting of the visa.
62. Therefore, based on the evidence and information before it, the Tribunal is satisfied that the applicant meets Public Interest Criterion 4020.
63. Accordingly, cl.801.226 in Schedule 2 to the Regulations is met

Has the applicant satisfied the identity requirements?

64. PIC 4020(2A) requires an applicant to satisfy the Tribunal as to his or her identity. The applicant's identity documents were provided with the application. No issue with her identity has been raised by the delegate. The Tribunal is satisfied that the applicant meets PIC 4020 (2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

65. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
66. There is no evidence the applicant or any member of her family unit had been refused a visa because of a failure to satisfy the identity requirement.
67. There is no evidence to suggest the applicant does not meet PIC 4020(2B) and therefore the Tribunal is satisfied it is met.

68. Conclusion

69. Based on the above, the applicant does satisfy PIC 4020 for the purposes of cl.801.226 at the time of decision.

DECISION

70. The Tribunal remits the applications for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Spouse) visas:
 - Public Interest Criterion 4020 for the purposes of cl.801.226 of Schedule 2 to the Regulations.

Russell Matheson
Member

71.

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is **false or misleading in a material particular** means information that is:
- (a) false or misleading at the time it is given; and

- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...